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The 1974-75 term provided no surprises in the federal taxation area. Generally, Tenth Circuit decisions were in agreement with those of other circuits. Four of the more interesting tax opinions have been selected for brief comment.

I. *Wortham Machinery Co. v. United States,* 521 F.2d 160 (10th Cir. 1975)

In *Wortham Machinery Co. v. United States*[1] a corporation's payment of a note which two of its major stockholders had personally guaranteed was held to constitute an economic benefit, taxable to the stockholders as a constructive dividend. The stockholders, two brothers, owned 63 percent in Wortham Machinery Co. (Wortham). One of the brothers joined with others to form a second corporation, Madera Manufacturing Co. (Madera). The new business was not prospering, so a bank loan of $85,000 was arranged, secured by a pledge of all outstanding stock in Madera and by the Norris brothers' personal guarantees. The personal guarantees were required because the bank did not permit one corporation (Wortham) to guarantee a loan made to another (Madera).[2] Wortham made payments of $3,000 per month on the note for over 2 years and eventually took over all of Madera's assets and liabilities.

The Tenth Circuit affirmed the trial court's holding that Wortham's payments on the loan to Madera were constructive dividends paid to Wortham's stockholders.[3] Citing *United States v. Smith,*[4] the court defined a constructive dividend as a corporation's conferring of "an economic benefit on a stockholder without expectation of repayment."[5] Because the company's payments reduced the amount of the brothers' liability on their guarantee, they had clearly enjoyed an economic benefit. The individ-

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[1] 521 F.2d 160 (10th Cir. 1975).

[2] Wortham Mach. Co. v. United States, 375 F.Supp. 835, 837 (D. Wyo. 1974).

[3] 521 F.2d at 164.

[4] 418 F.2d 589 (5th Cir. 1969). For similar holdings from other circuits, see, *e.g.*, Sachs v. Commissioner, 277 F.2d 879 (8th Cir.), *cert. denied,* 364 U.S. 383 (1960); Ferro v. Commissioner, 242 F.2d 838 (3d Cir. 1957); Wall v. United States, 164 F.2d 462 (4th Cir. 1947).

[5] 521 F.2d at 164.

ual taxpayers' failure to prove an intention to repay Wortham was held to constitute the requisite lack of expectation of repayment.[6]

II. *Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974)

The Internal Revenue Code delineates the statute of limitations applicable to tax refund claims, barring suits instituted more than 2 years after statutory notice of a disallowance of refund.[7] In *Kelson v. United States*[8] taxpayer Kelson filed two successive claims for the refund of his 1964 tax. The basis of the first claim, filed in 1967, was a carryback arising from a stock loss. In March 1968 the second claim was filed, based on the same loss carryback and, additionally, losses on two promissory notes.

In May 1968, pursuant to statute,[9] Mr. Kelson was mailed notification of the disallowance of the first claim. The second was disallowed on December 31, 1969. In 1971 Kelson filed the instant suit for the refund of taxes paid in 1964. Because this was more than 2 years after the first notice of disallowance, the suit would be barred as to the stock loss unless the second claim for refund extended the 2-year limit.

The court held that a second claim neither interrupts nor extends the time limitation when it merely reasserts a prior claim. Allowing such repetitive claims would indefinitely extend the statute and defeat its purpose.[10] The court further held that such claims are divisible. That portion of Kelson's second claim which had not been stated in the prior claim was timely, and, therefore, the court examined the merits of the claim as to the promissory notes.[11]

III. *Hayutin v. Commissioner*, 508 F.2d 462 (10th Cir. 1974)

Hayutin v. Commissioner[12] involved a dispute over the correct treatment of installment payments made pursuant to a di-

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[6] *Id.*

[7] INT. REV. CODE OF 1954, § 6532(a)(1).

[8] 503 F.2d 1291 (10th Cir. 1974).

[9] INT. REV. CODE OF 1954, § 6532(a)(1).

[10] 503 F.2d at 1293. This decision is consistent with those of the Second, Fourth, and Seventh Circuits. *See, e.g.*, Union Bleachery v. United States, 176 F.2d 517 (4th Cir. 1949), *cert. denied*, 339 U.S. 964 (1950); 18th Street Leader Stores, Inc. v. United States, 142 F.2d 113 (7th Cir.), *cert. denied*, 323 U.S. 725 (1944); Einson-Freeman Co. v. Corwin, 112 F.2d 683 (2d Cir.), *cert. denied*, 311 U.S. 693 (1940).

[11] 503 F.2d at 1293-94.

[12] 508 F.2d 462 (10th Cir. 1974).

vorce property settlement agreement. The agreement provided for a lump-sum settlement, part of which was to be paid in monthly installments over an 18-year period. The right of prepayment was granted, and all claims to alimony were waived.

The former husband claimed that the payments were made in satisfaction of an obligation incurred by reason of the marital relationship and, therefore, deductible by him. The ex-wife maintained that the payments were a division of property, nontaxable to her.

The Tenth Circuit had previously ruled that under Colorado law a wife has no vested rights in her husband's property, and such payments are in the nature of a personal obligation.[13] The Colorado Supreme Court, in *In re Questions Submitted by United States District Court,*[14] attempted to create an exception to this rule, holding that property rights vest at the time of filing the divorce action. Thus, transfers under a property settlement agreement would be a division of property between coowners.

In *Hayutin* the Tenth Circuit held that the Colorado Supreme Court's characterization was not controlling for tax purposes. Looking at the "true nature of the transfer under Colorado law," the court ruled that, although a burden was placed upon the husband's property, the wife did not become a part owner.[15] Therefore, only payments made by a spouse in acquiring individual ownership of specific property represent a division of property. Other payments are made in satisfaction of a marital obligation and are taxable to the wife and deductible by the husband.

IV. *Wagner v. Commissioner,* 518 F.2d 655 (10th Cir. 1975)

Wagner v. Commissioner[16] dealt with the issue of when the sale of real estate is complete for purposes of determining who may take a depreciation deduction. An installment contract provided that the property was purchased in the condition existing on the contract date. As of that date, the property was subject to

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[13] Pullman v. Commissioner, 329 F.2d 97 (10th Cir.), *cert. denied,* 379 U.S. 836 (1964).

[14] 517 P.2d 1331 (Colo. 1974). For a discussion of this and other state court opinions, see Note, *Federal Taxation of Divorce Property Settlements and the Amiable Fictions of State Law,* 52 DENVER L.J. 799 (1975).

[15] 508 F.2d at 468.

[16] 518 F.2d 655 (10th Cir. 1975).

a lease, and the contract provided that the seller would retain all rents until expiration of the lease in exchange for his paying the taxes and insurance during that period. Even so, the Tenth Circuit held that the buyer was the owner for purposes of deduction of depreciation.

In discussing the facts emphasized by the Tax Court, the Tenth Circuit considered the trade of rent for the payment of taxes and insurance to be irrelevant to ownership, because the trade was only a dollar exchange. The circuit court further noted that where property is sold subject to an existing lease, possession is not a necessary element of ownership, entitling one to a depreciation deduction.

According to the Tax Court, the buyer had bargained for the taxes, insurance, and rent terms for the purpose of receiving financial benefit, and such benefit precluded entitlement to a depreciation deduction. The Tenth Circuit, basing its decision on *Fribourg Navigation Co. v. Commissioner*,[17] reversed, holding that a "dollar loss" was not a prerequisite to an allowance of the deduction.[18]

Wagner seems to be a reasonable extension of *Fribourg*. Nonetheless, in *Kem v. Commissioner*,[19] the Ninth Circuit completely ignored *Fribourg* and stated that "if no loss is suffered, no allowance for depreciation is reasonable."[20] A clarification of *Fribourg* by the Supreme Court, answering the question whether some form of "economic loss" must be found before a depreciation deduction is allowed, would be helpful. *Wagner* and *Kem* have left that question open.

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[17] 383 U.S. 272 (1966), *cited in* 518 F.2d at 658.

[18] *Fribourg* involved a great increase in the value of a ship due to the closing of the Suez Canal. The Supreme Court held that the sale of an asset in excess of its adjusted basis was not in itself grounds for redetermining depreciation allowances. *Id.* at 277.

[19] 432 F.2d 961 (9th Cir. 1970).

[20] *Id.* at 963.